



Paper No. 5

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OFFICE OF PETITIONS

ON PETITION

In re Application of  
Stephen J. Brown  
Application No. 09/625,080  
Filed: July 25, 2000  
For: AGGREGATING AND POOLING  
INFORMATION IN A COMMUNICATION  
SYSTEM WITH FEEDBACK

This is a decision on the petition under 37 CFR 1.137(a), filed on June 13, 2003, to revive the above-identified application.

The petition is again **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned on November 14, 2000 for failure to respond to the Notice to File Missing Parts mailed September 13, 2000. Accordingly, a Notice of Abandonment was mailed May 9, 2002.

Petitioner argues that a response was timely filed on November 7, 2000 but that the serial number for the parent application was incorrectly used on the transmittal letter and the post card and thus there might exist some confusion as to how to process the response.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) the petition fee as set forth in § 1.17(l);
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and
- (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (c) of this section.

This petition lacks items (1) and (3), above.

### SHOWING OF UNAVOIDABLE DELAY

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.<sup>1</sup>

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.<sup>2</sup>

Pursuant to the rules in 37 CFR 1.5, correspondence directed to the United States Patent and Trademark Office must properly identify the application by the number assigned by the USPTO, the name of the applicant, the title of the invention, the date of filing the same, and, if known, the group art unit or other unit within the Patent and Trademark Office responsible for considering the letter and the name of the examiner or other person to which it has been assigned. By not providing the proper application numbers on the transmittal letter and the post card, petitioners did not use the care and diligence of a reasonably prudent individual in submitting the response and thus the response was not timely filed in the present application.

Additionally, since no extensions of time were obtained and by the time petitioners noticed that the wrong application number was placed on the correspondence, the application was already abandoned.

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<sup>1</sup>In *re Mattullath*, 38 App. D.C. 497, 514-15 (1912) (quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

<sup>2</sup>*Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

A delay resulting from the improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable" delay<sup>3</sup> and thus the showing presented is insufficient to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).

As petitioner has presented no showing of unavoidable delay, the petition will be dismissed.

Furthermore, the response to the Notice to File Missing Parts has still not been filed. It is appreciated that the required response, the declaration, may have been filed in the parent application but it has not been filed in this application and until such time as it has, the proper response to the Notice mailed September 13, 2000 is lacking.

### ALTERNATIVE VENUE

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(b)<sup>4</sup>, which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

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<sup>3</sup>See Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (N.D. Ind. 1987); Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

<sup>4</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions  
Commissioner for Patents  
P.O. Box 1450  
Alexandria VA 22313-1450

By FAX: (703)308-6916  
Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite CP4-3C23  
2201 South Clark Place  
Arlington, VA 22202

Telephone inquiries concerning this matter may be directed to the undersigned  
Petitions Attorney at (703) 305-4497.



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